In the United States Court of Appeals for the Ninth Circuit

No. 13564

UNITED STATES OF AMERICA, APPELLANT

v.

RICHARD W. DOUGLAS, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

REPLY BRIEF FOR THE UNITED STATES, APPELLANT

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ARGUMENT

JUST COMPENSATION FOR THE LAND TAKEN MAY NOT EXCEED THE APPRAISED VALUE STIPULATED IN THE CONTRACT

In its earlier brief, the Government said (p. 8): "Appellee's land was appraised at $1,353.01. He has not contended that the appraisal was too low. And the fact that he did not seek a reappraisal indicates his satisfaction with the original appraisal. Thus $1,353.01 is the fair value of the condemned land 'without * * * increment on account of the construction of the project.'" Appellee does not take issue with this statement of fact. Then, after a summarization of the pertinent provisions of the Columbia Basin Project Act, the Government pointed out (p. 8) that "appellee could not have sold his land for more than $1,353.01.

That amount, therefore, was market value." Again appellee does not contend otherwise. Accordingly, the Government submits: Since the value of the raw land did not exceed its appraised price and it could not have been sold for a greater sum, just compensation cannot exceed that amount and consequently an award for more than seven times that sum ($9,365.03) is manifestly erroneous. Nonetheless appellee seeks to sustain the judgment upon that award.

At the outset—before dealing with appellee's brief—the Government requests the Court to have the following in mind: Without water, the land was worth no more than the appraised value. Its value could be increased only if it received water. But, except for the contract with the Government, there was neither hope nor expectation of receiving water. Therefore, in seeking to sustain a judgment for more than the appraised price, appellee—despite his numberless disavowals—necessarily relies upon the contract. Tested by the foregoing observations, appellee's arguments crumble.

Thus, he first says (Br. 3-8) that since the Government is no longer bound to deliver water to the land, he is no longer prohibited from selling the land for more than the appraised price. As he puts it (Br. 7): "* * * it would be just as sensible for [appellee] to claim that the United States is still bound to deliver water to the edge of this tract. This is an absurdity; it is no less absurd to claim that Mr. Douglas is bound by his contract when the Government is released through its act in taking and in effect destroying his contract by the power of eminent domain."

But if it is absurd "to claim that the United States is still bound to deliver water to the edge of this tract"—and with this the Government agrees—how then can the value of the tract be enhanced by the prospect that the United States would deliver that water? And how then can the award of the trial court be sustained since it was based on the notion (p. 5 of U.S. brief) that the value of the land was to be determined by taking into account its right to receive water *under the contract?* It is evident, therefore, that the court fell into the absurdity pointed out by appellee.

Appellee also argues (Br. 3, 8-14) that the Government took not only his land but also his contract with the Government, that the appraised price only covered the land alone and that just compensation required payment also of the value of the contract which, appellee says, has not been appraised. This argument is dissipated by the recollection that the contract has no value apart from the land, because the right to receive water conferred by the contract could not have been assigned to any other land. Consequently, the only question is whether existence of the contract enhanced the value of the land beyond the appraised price (see e.g., *Brown* v. *Jefferson County,* 211 Ala. 517, 518, 101 So. 46 (1924) and since it prohibited sale of the land at more than appraised value, obviously it had no such effect.[1]

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[1] The argument that the contract was condemned with the land is inconsistent with the one premised on the conception that the contract was abrogated or destroyed. Though neither conception helps appellee, it may be noted he was right the first time. Of course, the Government did not have to become successor to appellee's rights to receive water from itself. Rather with the taking of the land, there was nothing left for the contract to operate on, and it ceased to exist. See e.g., *Brooks-Scanlon Corp.* v. *United States,* 265 U.S. 106, 120-121 (1924).

Despite appellee's assertion to the contrary (Br. 12-13) the instant case is indistinguishable from *United States* v. *Commodities Corp.*, 339 U.S. 121, 126-129 (1950). In each the governing facts were as follows: At the time of the taking the owner was not obliged to sell the thing condemned. However, at that time there was a ceiling upon the price at which it could be sold. There was every reason to believe that in the future this limitation would be removed and that the *res* then could be sold for a much greater amount. Yet the Supreme Court held that these circumstances were not to be taken into account in fixing just compensation. Similarly they should not have been considered in fixing just compensation in the case at bar.

Appellee is not helped by his assertion (Br. p. 13; see also Br. 7-8) that the award gave him only "that value which had been accumulated under his contract up to the moment of taking" and no "compensation for future values that would have been created by further progress in irrigation development." Certainly appellee was not entitled to be compensated for what he calls "future value"; it goes without saying that, even without regard to the Columbia Basin Project Act and the contract, appellant could not have recovered in 1951, when the land was taken, the price for which it could have been sold in 1959 after expiration of the restriction on resale price. It is equally certain—because of the provisions of the Act and the contract—that appellee could not receive in 1951 any part of the enhancement which would occur in 1959. There is no warrant for his notion that the land had a creeping value, i.e., that the value increased year by year as the interval between the signing of the contract and the date ending the restric-

tion on resale price shortened. Congress could have so provided. Instead, though permitting reappraisals at any time, it provided that such reappraisals should not take into account "increments [of value] on account of construction of the project" sec. 2(a)(i) (Appendix to U.S. Brief p. 13). It follows that at the time of the taking his land had not accumulated any value under the contract.

CONCLUSION

From whichever aspect the matter is viewed the value of the land at the time of taking could not exceed the appraised value. Either the land is to be considered without a contract right to receive water (in which case the appraised value is the market value) or it is to be considered with the contract right to water (in which case the contract limits its selling price to the appraised value). Accordingly, the award for more than the appraised value is erroneous and the judgment thereon should be reversed.

Respectfully submitted,

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